**HOCK HUA BANK BHD.**

**v.**

**LEONG YEW CHIN**

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR ACTING LP
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 278 OF 1985]
20 SEPTEMBER 1986

***CIVIL PROCEDURE:*** *Pleadings - Amendment to statement of claim - New cause of action introduced - Expiration of limitation period - Construction of O. 20 r. 5 of the Rules of the High Court 1980 - Discretionary power of Court to grant leave.*

The respondents had issued a writ accompanied by a statement of claim against the appellants on 8 October 1980 for a sum of RM1,230,207.58 being moneys wrongfully and illegally debited in respect of various Bills of Exchange by the appellants, interest and other consequential orders which the Court deems fit. The amount was amended to RM1,465,564.07 pursuant to Court Order of 13 November 1980. In 1984 application was made under O. 25 of the Rules of the High Court 1980 for leave to re-amend the statement of claim by introducing for the first time (a) the tort of conversion and (b) for moneys had and received by the appellants to the respondents' use. The application was dismissed by the Senior Assistant Registrar. On appeal, it was allowed by V.C. George J. The appellants then appealed to the Supreme Court.

The issue here was whether an application to amend a writ made pursuant to O. 20 r. 5 of the Rules of the High Court 1980, after the relevant period of limitation has expired, which introduces a new cause of action and gives rise to a new or substantially new relief, restricts the Court's power to grant leave for such amendment.

**Held:**

**[1]** By Abdul Hamid Ag. LP and Syed Agil Barakbah SCJ.

(a) The point taken by the appellants turned wholly upon the scope of r. 5 of O. 20 and is essentially a question of law.

(b) The main principle with regard to amendments is that they will be allowed at any stage of the proceedings on such terms as the Court thinks fit and just. However, the Court will refuse leave to allow such amendments if it results in prejudice or injury to the other party which cannot be compensated for by costs.

(c) It is clear that the Court has a discretionary power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action subject to one very important condition, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

(d) The fact that a new relief or substantially new relief has arisen out of a new cause of action should not be a bar to the Court's power to grant leave under r. 5. A new or substantially new relief which arises out of a new cause of action is in effect ancillary to the new cause of action.

(e) For the reasons given above, the appeal was dismissed with costs.

**[2]** Dissenting judgment of George Seah SCJ.

(a) The provisions of r. 5 empower the Court to grant leave to amend the writ in certain limited and defined circumstances if the Court thinks it just to do so.

(b) It is plain from the judgment of the learned Judge that he did not apply his mind to r. 5 but appeared to treat the application for leave to amend as an ordinary one. Therefore the application was considered afresh by His Lordship, following the principle in *Birkett v. James* [1978] AC 297 @ 317.

(c) For the purposes of this appeal, His Lordship dealt only with O. 20 r. 5(5).

(d) The Court may allow a new claim to be added only if the conditions specified in sub-rule (5) are satisfied and subject further to the overriding sub-rule (2) thereof. See *Chatsworth Investments Ltd. v. Cussins (Contractors) Ltd.* [1969] 1 All ER 143 and *Brickfield Properties Ltd. v. Newton* [1971] 3 All ER 328.

(e) Under the proposed amendment the respondents attempted to introduce two new causes of action based on the tort of conversion and for moneys had and received by the appellants to the respondents' use. Consequential to these amendments, the respondents will also amend the prayer by adding damages and exemplary damages, new relief which had not been claimed in the original action.

(f) Therefore, although the respondents had complied with condition (a) they had failed to satisfy condition (b) of sub-rule (5).

(g) Since both the conditions specified in sub-rule (5) had not been satisfied by the respondents, the learned Judge should have dismissed the application. For the reasons given above, the appeal should have been allowed.

*[Appeal dismissed with costs.]*

**Cases referred to:**
*Rodriguez v. Parker [1967] 1 QB 116*
*Mitchell v. Harris Engineering Co. [1967] 2 QB 703*
*Letang v. Cooper [1965] 1 QB 232*
*Government of Malaysia v. Mohamed Amin bin Hassan [1986] 1 MLJ 224*
*Birkett v. James [1978] AC 297*
*Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn.Bhd. [1983] CLJ (Rep) 428*
*Chatsworth Investments Ltd. v. Cussins (Contractors) Ltd. [1969] 1 All ER 143*
*Brickfield Properties Ltd. v. Newton [1971] 3 All ER 328*

**Legislation referred to:**
Rules of the High Court 1980, O. 20 r. 5, rr. (1), (2), (3), (4), (5), (6), (7), (8), O. 15 r. 1, O. 25

**Other sources referred to:**
*Supreme Court Practice* 1985, Vol. 1 pp. 340, 345, 20/5-8/6, 8/7, p. 341, 8/16
*Mallal's Supreme Court Practice* pp. 251, 341, para. 20/5-8/7, p. 345, para. 20/5-8/16

*For the appellants - Peter K.C. Yeoh (Mohd. Hashim bin Mohamed with him); M/s. Yeo & Yeo*
*For the respondents - Raja Abdul Aziz Addruse (Chew Biman with him); M/s. Chew Biman & Co.*

**JUDGMENT**

**Abdul Hamid Omar Acting LP:**

This appeal is against the decision of V.C. George J granting the respondents leave to amend the statement of claim after the expiration of the limitation period. The respondents had caused a writ accompanied by a statement of claim to be issued against the appellants on

8 October 1980. The matter relates to a claim in 1974. On 3 December 1984, the respondents took out 0.25 summons for directions seeking, *inter alia*, an amendment of the statement of claim to introduce a new cause of action, the nature of which is described by the learned Judge as follows:

> The proposed amendment in effect amounted to the contention that the said refusal to credit the amounts debited to the plaintiffs' account with the defendant bank amounted to a conversion of the amounts, alternatively the amounts so debited are payable to the plaintiffs as moneys had and received by the defendants to the plaintiffs' use.

The Senior Assistant Registrar before whom the application was initially heard dismissed it. On appeal it was allowed by the learned Judge. Hence the appeal.

It is common ground that the application to amend was made after the expiry of the period of limitation current at the date of the issue of the writ. It is also common ground that the proposed amendment raises a new cause of action adding substantially a new relief. However, it is not in dispute that the new cause of action arose out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

The main thrust of the appellants' contention was that the amendment was substantial and controversial and that it gave rise to a new relief. As such the learned Judge ought not to have allowed it. Reference was made by counsel for the appellants in the course of his submission to O.20 r. 5, Rules of the High Court 1980 (RHC). It is also the appellants' contention although not strenuously argued that there was *mala fide* on the part of the respondents.

On the question of *mala fide* the learned Judge found that the appellants had failed to establish it. He went on to say that leave would be granted unless the granting of leave would do an injury to the appellants that cannot be compensated by costs or otherwise. He further said that the appellants were not able to show that the amendment *per se* would affect the presentation of their case. As for the appellants' submission that the amendment was substantial and controversial, the learned Judge observed that there was nothing in the rules to support such a submission.

At this point I should like to also refer to that part of the judgment where the learned Judge said that:

> the plaintiffs have not by the purported re-amendments sought to introduce new facts. All that the purported amendments sought to do is to throw a different light on the effect of the same facts relied on in the original statement of claim. In my view all that the plaintiffs were seeking to do was to frame their case so that the trial of the action would lead to a decision of the real matter in controversy.

The learned Judge had, in my view, applied the correct test in determining the issue. The relevant law applicable is O. 20 r. 5, RHC. For convenience, they are set out hereunder:

> 5. (1) Subject to O. 15, rr. 6,7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> (2) Where an application to the Court for leave to make the amendment mentioned in para. (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under para. (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under para. (2), if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ of the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under para. (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

The point taken by the appellants turned wholly upon the scope of r. 5. It is essentially a question of law. The necessary question that calls for consideration is whether an application to amend a writ made pursuant to r. 5, that is, after the relevant period of limitation has expired, which introduces a new cause of action and gives rise to a new or substantially new relief, restricts the Court's power to grant leave for such amendment.

At this point I should stress that the appellants had not disputed that the new cause of action was founded on the same or substantially the same facts as the cause of action in respect of which relief had already been claimed. This is evident from the submission made by the appellants in the Court below. What the appellants were really concerned about was that a new or substantially new relief had emerged from the new cause of action.

Such being the case, it is appropriate first to consider the scope of O. 20 r. 5. The principle underlying r. 5 of O. 20 is that by this rule the Court may give leave to amend any pleadings even after the expiry of any relevant period of limitation. However leave to amend may be granted on terms to be imposed. Generally the order will be for the party who asked for the amendment to pay the costs of the application and incidentals thereto.

The validity of r.5 has not been successfully attacked. (see *Rodriguez v. Parker* [1967] 1 QB 116; see also *Mitchell v. Harris Engineering Co.* [1967] 2 QB 703). In both these cases the rule was held to be *intra vires* (see *The Supreme Court Practice* 1985 p. 340, also Mallal's *Supreme Court Practice* p. 251).

As for the general principles for the granting of leave to amend:

It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *G.L. Bakar Ltd. v. Medway Building & Supplies Ltd.* [1958] 1 WLR 1216, p. 1231; [1958] 3 All ER 540, p. 546).

It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights .... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be

done without injustice, as anything else in the case is a matter of right' (per Bowen LJ in *Cropper v. Smith* [1883] 26 Ch. D. 700, pp. 710-722, with which observations A.L. Smith LJ expressed 'emphatic agreement' in *Shoe Machinery Co. v. Cultam* [1896] 1 Ch. 108, p. 112).

In *Tildesley v. Harper* [1876] 10 Ch. D. 393, pp. 396, 397 Bramwell LJ said: 'My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.'" (*The Supreme Court Practice* 1985 para. 20/5-8/6 p. 340).

From the passages cited above it is overwhelmingly clear that "the underlying reasons governing the power under r.5 seem to be that if the proceedings had from the beginning been properly formulated and constituted in the circumstances specified in paras (3), (4) and (5) the defence of limitation would not have been available to the defendant, and accordingly the Court, if in its discretion thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in these paras, so that such defects in the proceedings are treated as having been cured *ab initio*, the defendant is not being deprived of the benefit or a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place." (*The Supreme Court Practice* 1985 para. 20/5-8/7 p. 341).

It is also clear from the established principle that the Court has power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action subject to one very important condition, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

There is absolutely nothing to show from the long line in authorities that if a new or substantially new relief arises out of the new cause of action the Court is ceased of its power to grant such leave, or that by doing so the Court would be acting outside the scope of r. 5. I am unable to accept any contention to that effect. Paragraph (5) of r. 5, in my view, is clear in its terms. Effect should therefore be given to the rule which clearly enables the Court to exercise its discretion in cases where it is satisfied that the new cause of action arises out of the same or substantially the same facts as the new cause of action in respect of which relief has already been claimed.

The fact that a new relief or substantially new relief has arisen out of a new cause of action should not be a bar to the Court's power to grant leave under r. 5. A new or substantially new relief which arises out of a new cause of action is in effect ancillary to the new cause of action and is indeed part and parcel of that new cause of action. The essential question to be considered in each case is "whether the changes alleged in the amendment sought to be made are the same or substantially the same as those alleged to support a cause of action already pleaded". (*The Supreme Court Practice* 1985 para. 20/5-8/16 p. 345).

The rule is silent: indeed, it does not make the granting of leave to amend under r. 5 conditional upon there being no new or substantially new relief arising out of the new cause of action. To construe otherwise would, in my view, be reading into r. 5 something which is not provided for. I am firmly of the view that a new relief is not a relevant consideration. In this regard it may be pertinent to refer to the definition of the words "cause of action" expressed by Lord Justice Diplock in *Letang v. Cooper* [1965] 1 QB 232, 242-3 as "a factual situation the existence of which entitled one person to obtain from the Court a remedy against another". The definition in my view fortifies the point I am making in that a relief or a remedy is ancillary to and not separable from a cause of action. The word 'relief' in para. (5) of r. 5

is clearly intended to refer or apply to the original cause of action. It is merely a description with reference only to the original cause of action and should not be construed with reference to the new relief. It is clear beyond argument that it should not have the effect of restricting the Court's power to grant leave to amend in cases where para. (5) of r. 5 is applicable.

I have had the advantage of reading the judgment of Lee Hun Hoe CJ (Borneo) in *Government of Malaysia v. Mohamed Amin bin Hassan* [1986] 1 MLJ 224. I do not think that that case is authority for the proposition that if a new or a substantially new relief is added or substituted by a new cause of action even though based on the same or substantially the same facts, the Court is not under the circumstances empowered to grant leave to amend under r. 5(5).

For the reasons given above, I would dismiss the appeal with costs.

**Syed Agil Barakbah SCJ:**

I have the advantage of reading the judgments of Abdul Hamid Ag. LP Malaysia, and George Seah SCJ They differ only on one material point i.e. whether or not "new relief" is a relevant consideration in allowing amendment to add or substitute a new cause of action after the relevant period of limitation current at the date of the issue of the writ has expired. The issue is governed by O. 20 r. 5(2) and (5) Rules of the High Court 1980 (RHC). Rule 5 states:

> (1) Subject to O. 15, rr. 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> (2) Where an application to the Court for leave to make the amendment mentioned in para. (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph **if it thinks it just to do so.**
>
> (3) An amendment to correct the name of a party may be allowed under para. (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
>
> (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under para. (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.
>
> (5) An amendment may be allowed under para. (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts **as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.**
> (Emphasis provided)

Generally speaking, the overriding principle with regard to amendments is that they will be allowed at any stage of the proceedings on such terms as to costs or otherwise as the Court thinks just. (See r. 5(1)). However, the Court will refuse leave to allow such amendments if it results in prejudice or injury to the other party which cannot be properly compensated for by costs. The object of allowing amendments at any stage of the proceedings is to enable the party to present his case properly at the trial. Amendments ought to be made to enable

the Court to determine the real question in controversy between the parties or of correcting any defect or error in any proceedings. In considering any amendment, the Court will have regard to any undue delay or whether the application is made *mala fide* or whether such amendment will in any way unfairly prejudice the other party.

Rule 5(2) deals with application for leave to amend in circumstances mentioned in para. (3), (4) or (5) as the case may be after the relevant period of limitation current to the date of the issue of the writ has expired. The Court is empowered to grant such leave in spite of the expiry of the limitation period if it thinks just to do so. The main issue involves the proper construction of para. (5). It refers to the discretionary power of the Court to allow amendment to add or substitute a new cause of action provided that the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief had already been claimed in the original action. The question in each case is whether the facts alleged in the amendments sought to be made are the same or substantially the same as those alleged to support a cause of action already pleaded. (*The Supreme Court Practice* 1985, Vol. 1, p. 345). That, I think, is the test to be applied in this case. The provision of para. (5) is clear and not ambiguous. It is therefore necessary to interpret the words in their plain and natural meaning in accord with the intention of the legislature, and should not however be extended beyond its natural and proper limit. (See *Government of Malaysia v. Mohamed Amin bin Hassan* [1986] 1 MLJ 224, 228 & 231).

My reading of para. (5) as underlined is that it merely refers to a cause of action in the original pleading in which relief has already been claimed. It does not either expressly or by implication prevent any amendment by adding or substituting a new relief. In this particular case, to allow an amendment only to the cause of action without allowing a similar amendment to the new relief will not serve any purpose. A *fortiori* when the latter is incidental to the former. Relief means a remedy sought by a plaintiff in an action. A cause of action is simply a factual situation the existence of which entitles a plaintiff to obtain from the Court a remedy against the defendant. (see Diplock LJ in *Letang v. Cooper* [1965] 1 QB 232, 242). There must be a cause of action before a plaintiff can claim a relief in an action. (See O. 15 r. 1 RHC 1980). I am therefore in agreement with Abdul Hamid Ag. LP, for reasons stated above. Relief is part and parcel of a new cause of action and in fact ancillary to it. In my view, it is just proper for the Judge in the Court below to grant the respondents leave to amend the statement of claim after the expiration of the limitation period as provided in r. 5 para. (2) by allowing the addition of a new cause of action and also new reliefs that flow from it. The appeal should be dismissed with costs.

**George Seah SCJ:**

This is an appeal against an order of the learned Judge in granting leave to amend the statement of claim of the respondent after the expiration of the limitation period. In *Birkett v. James* [1978] AC 297 @ 317 Lord Diplock said:

> Where leave is granted, an appellate Court ought not to substitute its own "discretion" for that of the Judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the Judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account, or (2) as in *Ward v. James* [1966] 1 QB 273, in order to promote consistency in the exercise of their discretion by the Judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations.

I would adopt this guideline in dealing with this appeal.

Now, the general principle with regard to amendments is regulated by O. 20 of the Rules of the High Court 1980 which has been explained by the then Federal Court in the case of *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.* [1983] CLJ (Rep) 428. There is no need to refer to that decision in detail except to observe that, in my opinion, the judgment relates to an application for leave to amend the statement of claim made after the close of pleadings. However, if the application is for leave to amend after the expiry of the relevant limitation period current when the writ was issued (as in this case) then, in my opinion, it is to be governed by O. 20 r. 5 thereof. The provisions of r. 5 empower the Court to grant leave to amend the writ or pleading in certain limited and defined circumstances mentioned in sub-rule (3), (4) or (5) albeit the application for such amendment is made after the expiration of the limitation period, and subject always to the overriding principle that if the Court thinks it just to do so. [see sub-rule (2)]. The question I have to consider is whether the learned Judge had applied O. 20 r. 5 when he allowed the amendment? At p. 6 of his Grounds of Judgment the learned Judge said:

> In my view all that the plaintiffs were seeking to do was to frame their case so that the trial of the action would lead to a decision of the real matter in controversy. This the plaintiffs have a right to do and leave will be granted for such amendments to be made unless the application made is *mala fide* or the granting of leave would do an injury to the defendants that cannot be compensated by costs or otherwise. The defendants were not able to show *mala fide* and they were not able to show the amendments *per se* would affect the presentation of their case.

It is plain from this passage that the learned Judge did not apply his mind to O. 20 r. 5 but appeared to treat the application for leave to amend as an ordinary one. This with respect, I think he had erred in principle and applying *Birkett v. James* (*supra*) I am at liberty to consider the application afresh in the light of the submissions made to us by learned Counsel for both the appellant and the respondent in this appeal.

Order 20 r. 5 is in the following terms:

> 5. (1) Subject to O. 15, rr. 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> (2) Where an application to the Court for leave to make the amendment mentioned in para. (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that para. if it thinks it just to do so.
>
> (3) An amendment to correct the name of a party may be allowed under para. (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
>
> (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under para. (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

> (5) An amendment may be allowed under para. (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts of substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

The principle underlying the new powers of the Court under r. 5 is that if the proceedings had been, from the beginning properly formulated and constituted in the circumstances specified in sub-rules (3), (4) and (5), the defence of the Statute of Limitations would not have been available to the defendant; and accordingly, if in its discretion, the Court thinks it just to grant leave to amend defects in the writ or pleading within the scope of the matters mentioned in these paragraphs, so that such defects in the proceedings are treated as having been cured *ab initio*, the defendant cannot be regarded as having been deprived of the benefit of a defence which he would not have had if the pleadings had been so properly framed in the first place.

I would proceed to examine the pleadings. In the statement of claim dated 8 October 1980 the respondent claimed judgment for RM1,230,207.58 being moneys wrongfully and illegally debited in respect of various Bills of Exchange by the appellant, interest and other consequential orders which the Court deems fit. The amount was amended to RM1,465,564.07 pursuant to Court Order of 13 November 1980. In 1984 application was made under O. 25 of the Rules of the High Court 1980 for leave to re-amend the statement of claim by introducing for the first time (a) the tort of conversion (see para. 8) and (b) for moneys had and received by the appellant to the respondent's use (see para. 9). As a result of these amendments, the additional relief now claimed by the respondent is as follows (i) under para. 8 the sum of RM1,465,564.07, interest, damages and exemplary damages or (ii) under para. 9 the sum of RM1,465,564.07, interest and damages, as well as other consequential orders.

For the purposes of this appeal I need only concern ourselves with O. 20 r. 5(5). In *Chatsworth Investments Ltd. v. Cussins (Contractors) Ltd.* [1969] 1 All ER 143 an amendment which relied on the same facts but alleged a novation of a contract as between the plaintiff, defendant and the original contracting party was allowed after the expiry of the period of limitation. Similarly, an allegation of negligence against an architect in the design of a building arises out of the same or substantially the same facts as an allegation of negligence against him in the supervision of the construction of the building was also allowed after the expiry of the current period of limitation even though it might thereby be adding a new cause of action (see *Brickfield Properties Ltd. v. Newton* [1971] 3 All ER 328). In both these cases, there was no amendment by way of new relief to the prayer. That additional relief is an important factor to be considered under O. 20 r. 5(5) appears in the judgment of Cross LJ in *Brickfield Properties Ltd. v. Newton.* At p. 343 the learned Lord Justice said:

> Rule 5(2) to (5) was clearly intended to add to the cases in which the Court would allow amendments notwithstanding the expiry of a period of limitation by stating in terms that the Court could allow amendments in certain types of case - e.g., the addition of a new cause of action - in which there had previously been a rule of practice not as a general rule to allow amendments. It may be however that, has a case such as this, where the pleader always meant to include the cause of action in question, arisen before the change in the rules, the Court would have allowed the amendment, at all events after the decision in *Pontin v. Wood* [1962] 1 All ER 294 notwithstanding that it involved the addition of a new cause of action ...
>
> In short, the Court may allow a new claim to be added only if the conditions specified in sub-rule (5) are satisfied and subject further to the overriding sub-rule (2) thereof. The conditions referred to in sub-rule (5) are the following:

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) that relief has already been claimed in the action by the party applying for leave to amend.

The question I have to consider is whether the respondent had brought his case within this ambit. Under the proposed amendments the respondent attempted to introduce two new causes of action based on:

(i) the tort of conversion (see para. 8) and

(ii) for moneys had and received by the appellant to the respondent's use (see para. 9).

Consequential to these amendments the respondent will also amend the prayer by adding damages and exemplary damages, new relief which had not been claimed in the original action, but only came in after the amendment to the statement of claim (see the judgment of Lee Hun Hoe CJ (Borneo) in the case of *Government of Malaysia v. Mohamed Amin bin Hassan* [1986] 1 MLJ 224). Although the respondent had complied with condition (a) but he had failed to satisfy condition (b) of sub-rule (5). Since both the conditions specified in sub-rule (5) had not been satisfied by the respondent the learned Judge should have dismissed the application.

For the reasons given above, I set aside the order of the learned Judge and allow the appeal with costs here and below to be taxed. The deposit to be returned to the appellant.

Also found at [1987] 1 CLJ 126